

1 went through this already - but the
2 incremental cost of selling the NFL Network to
3 Comcast is very low. There might be some very
4 small marketing costs, but it doesn't cost -
5 it isn't like building a new car where you
6 actually have to incur a lot of additional
7 marginal costs to make an additional
8 incremental sale, right?

9 A To make a copy, there is no extra
10 cost. Can I grant you that? Is that fair?

11 Again, you keep saying selling
12 cost, and I do think there is incremental
13 selling cost to get the next subscriber. But
14 in terms of making a copy of the program
15 itself there is no incremental cost, I grant
16 you that. The production cost, the
17 incremental production cost. Can we agree on
18 that?

19 Q Yes, I think I would certainly
20 agree with that. And isn't it true that the
21 NFL Network would make money selling to
22 Comcast at half the price that you projected

1 here? It would be incremental profitable for
2 the NFL Network to do that, wouldn't it?

3 A I'm not so sure in the sense that
4 they would have to - what they are trying to
5 do in this conversation that I just had with
6 the judge is that they were trying to maximize
7 profit based on this asset. One option is to
8 sell it to Comcast and let Comcast distribute
9 these games exclusively through Versus, in
10 which Comcast would write a check for a

11 [REDACTED] Another one is to try to
12 sell it as your own network and try to fetch
13 as much as you can.

14 So the idea that I can just willy-
15 nilly drop the price and not care about the
16 alternative that I just sacrificed, well, it's
17 a serious issue, and the way that you stated
18 it was a little too casual.

19 Q I guess what I'm trying to get at
20 is -

21 JUDGE SIPPEL: We have another
22 Mayday call. Does somebody have a Blackberry

1 on? Or may have a Blackberry on? It's not
2 me, because I forgot mine.

3 (Pause)

4 JUDGE SIPPEL: Better?

5 I'm sorry I interrupted.

6 BY MR. BURKE:

7 Q But again, first off, let's talk
8 about from the perspective of the NFL Network.
9 Because I think your counsel has made a big
10 point of distinguishing between enterprises
11 and the NFL.

12 So focusing on the NFL Network
13 itself, enterprises, it'd be profitable for
14 enterprises to sell to Comcast at half the
15 price you projected here, wouldn't it?

16 A You mean would they make
17 incremental margins, ignoring the up front
18 cost or the opportunity cost that they had to
19 sell the rights to some third party. Of
20 course the answer is yes. But the way I
21 interpret your question is, if I have a patent
22 over some drug would I make incremental

1 profits if I sold it at 5 cents instead of 50
2 dollars a pill? Yes, I would make incremental
3 profits, but I don't understand what it
4 establishes.

5 Q I'm not asking what it
6 establishes; I'm just asking you to answer the
7 question.

8 A Okay, well I grant you -

9 Q And the answer is yes.

10 A Well, the answer is what I said it
11 was.

12 Q Which I think was yes if you boil
13 it down.

14 A I'd prefer, instead of allowing
15 you to characterize the testimony on the
16 question, I gave you the best answer that I
17 could. WE can go back.

18 Q Let's not. I'd like to change
19 subjects a little bit and talk about crabs.

20 A Talk about?

21 Q I said about crabs.

22 A As in the kind you eat?

1 Q That is correct. Your Honor

2 brought that up as an example for pricing.

3 And in terms of trying to figure out what the
4 proper valuation of something is.

5 So let's take a hypothetical where
6 there are 100 bushels of crabs that have come
7 in to the dock, and let's say that Your Honor,
8 let's say that 20 of those bushels are sold at
9 \$10, and the other 80 are sitting there on the
10 docks still, they haven't sold yet. And there
11 are people who are kind of coming around
12 looking at them. There have been maybe some
13 bids and asks on the rest of those 80, but no
14 one else has actually had a meeting of the
15 minds yet on those other 80 of the bushels.

16 Is it your view that the proper
17 way to value those other 80 bushels is to say,
18 it was \$10 for those first 20, so it's got to
19 be \$10 for the other 80?

20 A I think if I had sold the first 20
21 at - give me the number again?

22 Q At \$10.

1 A At \$10, and then another customer
2 walked up to me and said, I want to buy a
3 crab, I would say, I'm selling these crabs at
4 \$10. So I believe that, yes, to use another
5 analogy, if you want to value my house, look
6 at the five homes that sold that are identical
7 to it to the left or right. I am sure there
8 were bidders that went up to that home, to my
9 neighbor's home, and decided not to bid. But
10 I wouldn't poll the guy who didn't buy the
11 home after the fact and say what were you
12 willing to pay. He didn't buy the home;
13 somebody else bought the home. And that
14 transaction is what created the marketplace.

15 Q Let's try to tie this into the
16 case, and then we will continue with our
17 hypotheticals.

18 When you did this analysis you
19 looked at people, MPVDs, that had actually
20 reached an agreement with the NFL Network to
21 carry the NFL Network, right? There are
22 people who have agreements with the NFL

1 Network, right?

2 A Correct.

3 Q And in your regression analysis
4 you didn't put in anything for the people who
5 decided the NFL Network was too expensive,
6 right?

7 A I did not, and I should not have.

8 Q And we looked through the
9 documents earlier that showed there are lots
10 of MPVDs that have concluded that the NFL
11 Network is too expensive and they don't want
12 to pay what the NFL Network is asking.
13 Remember those documents?

14 A Yes, including some who thought it
15 was too expensive and yet paid the market
16 price, yes.

17 Q And unless they actually reached
18 an agreement with the NFL, you didn't factor
19 that into your calculation; isn't that right?

20 A Correct.

21 Q So in the situation, going back to
22 the bushel of crabs, your view is that what

1 the first 20 bushels sell for is necessarily
2 the right price for the other 80, even if
3 there have been people who looked at them and
4 decided that is too expensive; I'm going to
5 come back later in the day and maybe I'll get
6 them for six.

7 A I don't know if I'm going to
8 accept the crab analogy here. But based on my
9 best advice and opinion, my expert opinion on
10 how to do the valuation, we look at the
11 transaction prices, the market prices, of what
12 it has sold for in the market. The FCC tells
13 me to do that; I know that from economic
14 theory. And my analogy, which I think is more
15 apt, is, I wouldn't go poll the person who
16 looked at my neighbor's house but decided not
17 to buy it, and he went to another
18 neighborhood, I wouldn't poll him and ask him
19 what would you have paid, I would just look at
20 what the price my neighbor's house would have
21 sold for.

22 Q We'll talk some housing analogies

1 in a minute, but I want to stick with crabs.
2 I mean crabs are obviously perishable goods.
3 The day is getting late, it's getting a little
4 stinky, you might have to drop the price of
5 your crabs to clear out the rest of those
6 crabs; isn't that possible?

7 A Now you are actually making my
8 point, which is that the analogy has no
9 relevance here. Now you are talking about a
10 perishable good, and I don't see why the NFL's
11 program would perish over time.

12 Q Well, then, let's go to housing
13 then. Housing is not a perishable good
14 generally?

15 A Correct.

16 Q Okay, so let's posit a
17 subdivision, and we'll say it's in some place
18 that's doing great, like Orange County, or St.
19 Petersburg, Florida. And they build 100
20 houses in this subdivision, and they sold 20
21 of them for \$1 million. Then there are 80
22 that haven't been sold at all. And there are

1 buyers, they come and they bid \$500,000, and
2 the seller says, I'm not going to take it; I'm
3 going to hold out for more.

4 Is it your testimony that the
5 value of those 80 other houses is \$1 million
6 each?

7 A Hm. (Pause) I think that if the
8 seller has excess inventory and he wants to
9 move it, then the first price he is going to
10 name to the next guy who walks in the door is
11 what the first 20 sold for obviously. But if
12 he wants to move the inventory he might drop
13 it. But certainly we would not go out and
14 take a survey of the people who looked at the
15 20 houses that sold, but did not buy them, and
16 ask them what they thought the valuation was.
17 Their opinions don't matter.

18 Q So it's your testimony, I think,
19 that in fact that first 20 that sold for \$1
20 million does not mean necessarily the other 80
21 are worth a million dollars at all?

22 A I think that is the best indicator

1 of what the other 80 are worth. Whether or
2 not they will fetch that in this stylized
3 example is another matter.

4 Q And if they'd gone unsold for a
5 year does that stop being the best indicator
6 of what they are worth? Did the fact that you
7 sold 20 at \$1 million, and the other 80 are
8 sitting there for a long time, people keep
9 coming, keep looking, keep turning it down,
10 doesn't that million-dollar projection start
11 to become a little less good a projection of
12 what the other 80 houses are worth?

13 A Well, now you are changing another
14 important fact, is that you are moving around
15 a demand curve. And of course if the demand
16 curve is revealed to be less than what we
17 thought it was, then if there is a recession
18 it's possible the value of the homes will go
19 down.

20 Q How many major new MVPD affiliates
21 has the NFL Network signed up in the last
22 year?

1 A They keep resigning people all the
2 time. They did two in the last month.

3 Q I asked for new affiliates, people
4 who are incremental new major MVP affiliates.
5 How many has the NFL signed up in the last
6 year?

7 A I don't know.

8 Q So at some point, the projections
9 that have been signed up for these existing
10 MVPDs, they get stale, don't they?

11 A No. I'm trying to project what
12 the price would have been in 2008 based on
13 contracts that cover 2008 prices. I don't
14 know why they would be stale for 2008.

15 Q Actually I will even go further.
16 How many new affiliates has the NFL signed up
17 in the last three years?

18 A I don't know. I have a database
19 of 240 contracts. They all have dates on them
20 when the transaction occurred, but I didn't
21 commit those to memory for today.

22 Q AS an economist, Dr. Singer,

1 aren't there situations where you can have a
2 bunch of sales to one group of people at some
3 price, and you can average that out or run a
4 fancy regression on it, but there is a whole
5 other group of people who are unwilling to pay
6 that price? Can't that situation arise?

7 A Yes, it can arise.

8 Q And why would you use the price
9 that the first group paid to project what the
10 second group would pay?

11 A Because going back to my housing
12 example, this is the market transactions. I
13 cannot question, when two buyers enter into a
14 - when a buyer and seller enter into a
15 voluntary transaction, and they sign a piece
16 of paper that commits them to pay [REDACTED]
17 and you ask me what it's worth, I don't know
18 how to make an adjustment downward for the
19 fact that some people turned the [REDACTED]
20 [REDACTED] is my best estimate.

21 Q I'm sure there are a lot of people
22 with houses in subdivisions in Southern

1 California and Florida that would love your
2 analogy. But isn't it possible that over time
3 those past projections don't actually project
4 the future?

5 A You are going to a very stylized
6 example. I am trying to sell my house right
7 now; I know what my neighbors sold their house
8 for in the past six months. That is the price
9 that I'm going to ask.

10 Q But all those houses are occupied,
11 isn't that right?

12 A All my - yes, and in your example,
13 you are coming up with a very stylized or
14 extreme example where people are in despair,
15 and they are in foreclosure, and we are
16 running to the hills; our banks are being
17 closed down on us.

18 I mean I can concoct an example
19 too that it doesn't work. But in my - easier
20 to understand and more normal housing analogy,
21 if you are going to buy my house, which by the
22 way is for sale, look at what the transactions

1 were in the last six weeks on my street. You
2 would look at the transactions of the
3 identical colonials to the left and right that
4 sold in the last six months.

5 And your expert would ask me to go
6 poll the guy who looked at my neighbor's house
7 who didn't buy my neighbor's house. And I
8 would say that opinion is worthless to my
9 valuation.

10 Q But isn't the difference here that
11 in your subdivision all those houses are sold.
12 They are already occupied, versus the
13 hypothetical where there is excess inventory,
14 right?

15 A Right, but there is no excess
16 inventory building up that has to be let out
17 by NFL with the threat that it's otherwise
18 going to go bankrupt.

19 Q You heard Mr. Hawkins' testimony
20 yesterday about the market clearing price; do
21 you remember that?

22 A I heard it, yes.

1 Q And is the concept of a market
2 clearing price, are you familiar with that in
3 economics?

4 A Yes.

5 Q Okay, what is a market clearing
6 price?

7 A The definition I would have
8 offered you, and I didn't hear it yesterday,
9 would be the price at which supply and demand
10 intersect.

11 Q And the NFL's own internal
12 documents project that the market clearing
13 price for its inventory is between [REDACTED]
14 and [REDACTED] do you recall seeing that
15 document?

16 A No, I'm not sure that I've seen
17 it. I'm happy to look at it now, but what I
18 interpret that to mean is that if they wanted
19 to literally get 100 percent penetration
20 across the entire United States, they'd have
21 to bring in somewhere between [REDACTED] and [REDACTED]
22 percent. I don't think that that is their

1 objective. A firm does not set out in life to
2 say that what I want to do to day is sell the
3 most number of widgets that I humanly can.
4 They set out to maximize profits.

5 And sometimes maximizing profits
6 entails something different than maximizing
7 sales. That's not what firms do. As an
8 economist we don't subscribe to that.

9 That is I of course could set up a
10 price for anything I'm selling to ensure that
11 every person in the United States takes it,
12 but that is not my objective; my objective is
13 to maximize my profits, and that might call
14 for a price, a higher price, in which some
15 people buy it and some people don't buy it.

16 Q And that's what the NFL Network
17 has done, it has elected to price its product
18 highly and face the risk that some people are
19 going to turn up their nose and say, we don't
20 want this?

21 A I would say, all economists can
22 say on that point is that they have decided to

1 maximize profit the same way Comcast
2 presumably is maximizing profit. I mean that
3 is the central tenet of all economic theory.
4 All micro-theory begins with the assumption
5 that firms set prices in order to maximize
6 profit. That doesn't make NFL evil; that
7 doesn't make Comcast evil. They are just
8 maximizing profits.

9 Q Dr. Singer, I am not asking you to
10 put any normative judgments on this. I am
11 asking you, based on your extensive work on
12 this matter, the documents you reviewed, the
13 depositions you reviewed, the testimony that
14 you have heard in open court here, isn't it
15 the policy that the NFL has adopted is to
16 price its product highly and take on the risk
17 that it is going to have some extra inventory,
18 some extra crabs at the end of the day that it
19 can't sell?

20 A I wouldn't characterize it that
21 way. I would say that their policy is to
22 maximize profit. They have come up with a

1 number; on average a simple average is [REDACTED]
2 [REDACTED] but a weighted average is somewhere in
3 the [REDACTED] Recognizing that not everyone is
4 going to take it at that price.

5 Q So they recognize that they might
6 have some crabs left over at the end of the
7 day?

8 A Sure.

9 Q Okay. By the way you said that
10 the NFL Network is not perishable the way
11 crabs are, but isn't it in some sense? Each
12 individual game is perishable? Once the fall
13 season is over, once there are eight games of
14 play, in fact the value of the NFL Network for
15 the rest of that year declines significantly,
16 doesn't it?

17 A The value of that particular game
18 that is now past has declined, but they are
19 selling a stream of games that are going off
20 into the future for five years at a time in
21 these contracts.

22 Q I know they are pretty lumpy

1 games; they are only occurring in the fourth
2 quarter of each year, right?

3 A The time of year that matters
4 most, correct.

5 Q Okay.

6 JUDGE SIPPEL: Is that - the last
7 quarter, it's not all the games that are all
8 that attractive. It's only the games of the
9 ones that are contenders?

10 THE WITNESS: Right. So holding
11 all things equal, a game in the last quarter,
12 in the fourth quarter, remember, that's when
13 the ratings surge, that is determining the
14 playoffs. At that point you know whether a
15 team, winning or losing, is going to make the
16 playoff. So the fourth quarter, in a game and
17 in the season, is important.

18 And the NFL if I understand
19 correctly has some discretion over which games
20 are going to be played, are going to be
21 televised.

22 JUDGE SIPPEL: Televised? All

1 right, never mind. That makes sense.

2 BY MR. BURKE:

3 Q And just to be clear, none of
4 these are playoff games, right?

5 A The Dallas Cowboy-Baltimore Ravens
6 game that I TIVOed and watched at midnight had
7 the effect of being a playoff game. It was
8 the second to last week, and depending on
9 whether or not Dallas - and I'm admitting my
10 loyalties here - won or lost was going to
11 dictate whether or not we made it into the
12 playoffs.

13 So the end of season games, that
14 is the time for the striking. That is the
15 time that people are most tuned in and excited
16 about watching football.

17 Q Dr. Singer, can you answer my
18 question please. Does the NFL Network offer
19 any playoff games?

20 A Oh, no, they do not.

21 Q Thank you. I want to talk a
22 little bit about regression analysis, and I

1 don't - you are the expert here, so I'm just
2 going to try to ask very basic questions, and
3 make sure we understand the best we can.

4 You used nine MVPDs in your
5 regression analysis; is that right?

6 A Nine MVPDs across four years in
7 time; correct, four or five years in time, I'm
8 sorry.

9 Q And there are about 240 other
10 MVPDs that you elected not to include as part
11 of your sample. You elected to just select
12 these nine?

13 A Because these nine accounted for
14 95 percent of all the NFL subs that have been
15 sold.

16 Q If you only had nine observations
17 by itself, that would be inadequate to connect
18 a reliable regression analysis, right?

19 A So to restate, if you only had
20 2008 data for these nine MVPDs, that's how I'm
21 interpreting the question, so you literally
22 had nine observations in your database, that

1 generally would be too small to put into a
2 regression analysis, that is correct. Is that
3 okay?

4 Q Yes, nine observations is not
5 enough to do a reliable regression analysis;
6 that's correct.

7 A Yeah, if we only had 2008 data
8 that is correct, yes.

9 Q Now one of the things we talked
10 about was the contract or the price that you
11 have used for DIRECTV here. How did you
12 derive that price, Dr. Singer?

13 A Beginning with the surcharge,
14 which is the most important component, and
15 that comes out of the NFL-DIRECTV contract,
16 and that is I believe [REDACTED] per subscriber
17 per month.

18 And if I'm recalling correctly we
19 had what are called remittance reports between
20 DIRECTV and NFL Network that showed the cash
21 flows between the two parties. And from that
22 we tried to figure out what the base rate was

1 to layer on top of the [REDACTED] surcharge.

2 Q So looking here we've got about [REDACTED]

3 [REDACTED] or something, or [REDACTED] for DIRECTV.

4 You're saying about [REDACTED] - or [REDACTED]

5 rather, is the game surcharge, and the

6 balance, say [REDACTED] is the base rate; is

7 that right?

8 A Correct.

9 Q Now have you actually looked at
10 the contract between DIRECTV and the NFL?

11 A You have to specify which one.
12 The one that I just looked at probably a few
13 days ago was the renewal contract. Is that
14 the one you are asking about?

15 Q Well, you didn't use that. That
16 contract doesn't apply to this time period,
17 the renewal contract, does it?

18 A It does not. I'm sorry, I was
19 just trying to figure which -

20 Q For the period that covered your
21 regression analysis, the contract was the 2004
22 DIRECTV-NFL contract.

1 A The sounds right.

2 Q Did you look at that 2004 DIRECTV-
3 NFL contract?

4 A Yes, I did, as well as my staff,
5 which was tasked with putting together the
6 database, yes.

7 Q And was there anywhere in that
8 contract a specification of what the base rate
9 was for the NFL Network?

10 A I don't believe a specification.
11 Like I said the only thing that was specified
12 was the surcharge. I believe the rules for
13 how the base rate would be established and
14 then got implemented through these remittance
15 reports - I believe there was some language to
16 that effect, if I am recalling correctly.

17 But I grant you that they did not
18 agree to that [REDACTED] base rate in that
19 contract.

20 Q In fact the contract left the base
21 rate completely at the discretion of the NFL?

22 A I'm reluctant to weigh in on that

1 aspect, because it sounds more legal than
2 economic. But I'm happy to assume it for the
3 purposes of the questions.

4 Q Let's step back for a second.
5 This was a contract that covered not just the
6 NFL Network but also the Sunday Ticket, right?

7 A Correct.

8 Q It was a bundled contract, right?

9 A Yes, in fact DIRECTV got a bundled
10 rate. That is, they got a less than market
11 rate for this programming. I know you don't
12 like it, but it is actually helping you in
13 this analysis.

14 Q You don't have to characterize
15 whether I like it or not. I'm not sure I even
16 understand why I would like it or not,
17 frankly.

18 A Because you like lower rates, all
19 things equal.

20 Q But what I'd like to understand
21 is, how do you separate out the price that is
22 being paid for the Sunday Ticket versus the